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**1992 AND THE IMPLICATIONS FOR BANKING
AND FINANCE – AN OVERVIEW**

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1992 AND THE IMPLICATIONS FOR BANKING AND FINANCE -
AN OVERVIEW

Without denying the psychological importance of the date 1992 in arousing a general awareness of Community law, the rules of the EEC Treaty relevant to the activities of financial institutions remain those which have been in force since the end of the transitional period, subject to certain procedural amendments. Hence, this paper is largely concerned with Community law and banking and finance rather than with 1992 and banking and finance. What does however appear to have changed is the political willingness to give effect to those rules, and financial services are considered in some detail in the White Paper on completing the Internal Market. In Lord Cockfield's White Paper, emphasis is put on the free circulation of "financial products", with the suggestion that a similar approach could be taken to that adopted with regard to the free movement of goods. When such an analogy was in fact pursued by the European Court at the end of 1986, the result, as will be seen, was not perhaps what the Commission expected or desired. Might it be suggested that the term "financial products", although used in U.K. financial services legislation, is not very helpful. It seems to imply that financial services may be equated with goods which can simply be bought and taken away, whereas the fundamental problem with financial services in European Community law is that what is on offer is a continuing legal relationship, the very nature of which may be dependant upon the local legal system.

In reality financial services are a matter of particular complexity in the context of the EEC Treaty because they link the provisions specifically relating to movements of money, in particular the movement of capital (arts. 67 to 73) and current payments (art. 106), to the general provisions concerning establishment, services and competition,

even if in the view of the European Court, a clear distinction may be drawn between "means of payment" and goods, so that means of payment do not benefit from the principle of the free movement of goods¹. They also raise the awkward political question, going beyond a basic consideration of the legal texts, as to whether in fact an integrated market for financial services or for the movement of capital can in reality be achieved without a form of control of currency fluctuations between the exchange rates of the currencies of Member States, or indeed without the development of common currency units, a question which obviously involves consideration of² the scope and membership of the European Monetary System³ and the use of European Currency Units.

However, the aim of this paper is to deal first of all with the general and well-known provisions on establishment, services and competition as they affect financial services before moving to the special rules which relate to money.

Establishment

Quite apart from the general rules on freedom of establishment, it is worth noting that in the original form of the Treaty there were restrictive provisions with regard to certain aspects of the establishment of financial institutions. The second paragraph of art. 57, as originally drafted, required the Council to act by unanimity on measures concerned with the protection of savings, in particular the granting of credit and the exercise of the banking profession. One of the more positive results of the Single European Act is that by virtue of arts. 6 and 16 of that Act, this special provision with regard to the protection of savings etc. has been deleted and it would appear that

this is now an area where the Council is to act by a qualified majority in co-operation with the European Parliament.

Establishment as defined in art. 52 of the Treaty includes the setting up of agencies, branches, or subsidiaries and the right to set up and manage undertakings, in particular companies or firms within the meaning of article 58 (2). In the light of this, and providing a first link with the monetary provisions of Community law, it is worth noting that from the outset the directives on the movement of capital⁴ have required Member States to permit direct investments⁵, direct investments being defined⁶ as relating to the establishment and extension of branches of new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings, or participation in new or existing undertakings with a view to establishing or maintaining lasting economic links, and also include reinvestment of profits with a view to maintaining lasting economic links.

Traditionally in this area of the law, the European Court has been rather reluctant to make a clear distinction between establishment and services⁷. However, in the recent insurance cases⁸, the Court has endeavoured to make a clear distinction between establishment and services, holding that if an undertaking is established in another Member State, even by means of a branch or permanent agency, it may not invoke the provisions relating to services. Whilst this may be justifiable on a literal interpretation of the provisions relating to services, which define services in effect as economic activities that do not fall within the other freedoms⁹, it is hardly the type of interpretation which one has learnt to expect from the European Court of Justice¹⁰. This judgment appears to have influenced the

drafting of Council Directive 88/357¹¹, the second insurance Directive, art. 3 of which in effect deems any permanent presence, including a mere office managed by the undertaking's own staff or by a person who is independent but has permanent authority to act for the undertaking, as establishment, but art. 13 of which requires that undertakings established in a Member State should be allowed to cover certain risks by way of provision of services. However, whatever form establishment takes, it is now clear from Case 270/83 Commission v France¹², that Member States may not treat companies differently for tax purposes depending on the type of establishment present within their jurisdiction. It was there held that France could not treat the branches of foreign insurance companies whose main offices were in other Member States differently for the purpose of setting off certain tax from those insurance companies which took the form of French-based companies which were subsidiaries of those foreign insurance companies. In the light of this it is intriguing to note that the proposed Second Banking Directive¹³ distinguishes between branches and subsidiaries, treating the establishment of branches like the supply of services from another Member State, subject in principle to home State control. Furthermore, it was made clear that there was no way that restrictions could be imposed on the freedom of establishment in order to prevent tax evasion¹⁴. Insofar as an undertaking formed in one Member State may wish to move its business activities to another Member State without re-registering as a company or firm formed under the law of the host State, a matter which previously had been thought by legal theorists to raise complex problems of the recognition¹⁵ of the artificial legal persons of another legal system¹⁶, the judgment of the Second Chamber in Case 79/85 Segers¹⁶ contains the statement that it is not relevant that a foreign company

operates solely in another Member State, requiring such a company in effect to be granted equal treatment with companies of the host State despite its registered office being in another State; admittedly, however, this case was concerned with rather technical matters of social security. The views of the legal theorists appear, however, to have been proved correct in Case 81/87 R v H.M. Treasury ex p. Daily Mail¹⁷ where it was pointed out that companies exist only by virtue of national legislation and that the Treaty rules on freedom of establishment did not overcome the national law problems as to retention of legal personality on the transfer of the registered office or real head office to another Member State, so that they did not confer a right to transfer central management and control to another Member State. Hence a company incorporated under a system, such as the French, which requires the "siège réel" to remain in the state of incorporation, will not be able to take advantage of primary establishment. It was suggested that in the case of companies, the right of establishment would usually be exercised by the setting up of agencies, branches or subsidiaries.

On the other hand, in the light of what has happened in the financial services sector, it is perhaps worth observing that where establishment has been effected by natural persons, the European Court has been unwilling to enter into discussion as to whether a qualification obtained in one Member State is equivalent to the qualification required in the host Member State, unless there are rules of either national or European Community law providing for such recognition¹⁸.

Services

Whilst the basic aim of the provisions on freedom of establishment may be to achieve equal treatment for somebody establishing himself in a particular Member State with the nationals or companies of that Member State, equal treatment with nationals is not necessarily the main problem with regard to provision of services. This was realised in the earliest cases, such as Van Binsbergen¹⁹, or Coenen²⁰, which in fact both involved the provision of services across a border by persons who were nationals of the country in which the service was to be provided, but resident in another Member State. If, however, the aim of freedom to provide services is the removal of obstacles to the provision of services rather than equal treatment with host State nationals, the question arises as to how far such freedom should go. If a comparison may be made with the much litigated area of the free movement of goods, it is widely thought that the case-law, particularly the famous Cassis de Dijon²¹ case, has established the principle that goods sold in one Member State may be sold in another. However, whilst recognising the fundamental importance of this principle, the possibly heretical view could be put forward that in fact Cassis de Dijon represented a restriction of the earlier case-law, particularly with regard to national price legislation²², which had held such legislation to have an effect equivalent to a quantitative restriction even where it quite genuinely applied on the same basis to national and imported products, where it had the effect of making the sale of imported products more difficult than that of domestic products, if not impossible.

In this view, the real importance of the Cassis de Dijon

decision is its recognition of the so-called mandatory requirements, that is requirements which Member States may in the absence of Community rules impose on goods imported from other Member States even though that may have the effect of restricting or even rendering impossible such importation. It may further be observed that high on this list of mandatory requirements, comes the protection of consumers, a matter which was fundamental to the judgment of the European Court in the insurance cases²³. Furthermore, the Treaty itself recognises as legitimate certain restrictions on the movement of goods laid down in art. 36, i.e. restrictions justified on grounds of public morality, public policy and public security, the protection of health and life of humans, animals or plants, the protection of national artistic, historic or archeological treasures, and the protection of industrial and commercial property, provided, of course, that such restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. Nevertheless, it may still be asserted that it is only because of this case-law that the authors of the White Paper were able to assert that the single market could be completed by a specified number of Directives.

It is therefore intriguing to observe that, despite the absence of any equivalent of art. 36 in the field of the provision of services, the Court has in fact invented permissible restrictions which parallel art. 36, and possibly also the so-called mandatory requirements²⁴. So, for example, the Court has in Case 52/79 Debauve recognised that a Member State may enforce its public policy with regard to prohibition of advertising on television services provided from another Member State, and in Case 67/79 CODITEL v Ciné Vog²⁵, the Court recognised that intellectual property

rights in a film could be protected again against a television showing of that film transmitted from another Member State.

On the other hand, the Court has, since its decision in Van Waesemael²⁶, recognised the concept of the equivalence of safeguards, holding that where a Member State requires certain safeguards to be complied with, the fact that the provider of the service complies with those same safeguards in his home State, is sufficient to allow a service to be provided. All this, it may be suggested, forms a necessary background to understanding the Court's decisions in the insurance cases.

The policy issue which is raised is essentially whether the consumer in the context of the provision of services should have a choice between paying less and receiving fewer safeguards in return, and paying more and receiving greater protection, or whether Member States should be permitted to restrict this choice by insisting on certain minimum safeguards that must be met by every provider of the particular service. The response of the European Court seems to be that it depends on the economic level at which a particular activity is carried out, but it is worth again noting the special protection given to consumers²⁷, defined in the recent Consumer Credit Directive as a natural person acting outside the scope of his trade or profession²⁸. To summarise Case 205/84 Commission v Germany²⁸, the Court held that with regard to direct insurance effected through intermediaries, Germany was justified in requiring insurance undertakings established in other Member States to comply with its authorisation requirements insofar as they were necessary to ensure the protection of policy-holders and insured persons²⁹, irrespective of the fact that such insu-

rance companies may be authorised in their home States, provided the insurance companies were not required to duplicate conditions already met in their home State³⁰, and given a situation in which Community law had harmonised solvency requirements but not the rules relating to "technical reserves" or conditions of insurance³¹. It was, however, expressly recognised that there may be situations where, because of the nature of the risk insured and of the party seeking insurance, there was no need to protect the latter by the application of mandatory rules of his or her national law³². In particular, the Court held that, in the field of co-insurance, there was no justification for the German requirement that the leading insurer should be authorised by the German authorities, the arguments for consumer protection not having the same force as in connexion with other forms of insurance since, in the view of the Court, co-insurance arises in the context of insurance taken out only by "large undertakings or groups of undertakings which are in a position to assess and negotiate insurance policies proposed to them". This distinction has been followed by the second insurance Directive³³, which in effect provides freedom for large risks, but does not really provide freedom to provide insurance services across frontiers at the level of ordinary consumers. In any event, according to the Court, Council Directive 78/473³⁴ already provided sufficient co-ordination and co-operation between supervisory authorities in the Member States. In neither case, however, did the Court accept that a German requirement that the insurance undertakings should themselves be established in Germany had been shown to be indispensable³⁵; indeed, it took the view that such a requirement³⁶ would negate the freedom to provide services.

It may be suggested that the basic 1973 Directive on the

Freedom of Establishment and Freedom to Provide Services in relation to the activities of banks and other financial institutions³⁷, in reality became redundant very shortly after it entered into force following the judgments of the European Court which held that the basic principles of freedom of establishment and freedom to provide services were in fact directly effective. If, however, a general comment could be made on the subsequent legislation which has particularly concentrated on what are termed 'credit institutions', it may be suggested that the common feature of this legislation is to ensure certain common standards of supervision of credit institutions and to ensure that certain accounting principles are followed by banks and credit institutions; hence, the emphasis appears to be on control rather than freedom. The fundamental question is, of course, how far the one can exist without the other. On the other hand, the unit trusts Directive³⁸, which would appear to have been regarded as the model for future development, is based on the concept that authorisation by the competent authorities of the home Member State is valid for all Member States³⁹ - essentially the principle urged by the Commission in the insurance cases. However, closer examination shows that Member States may apply their own marketing and advertising rules to UCITS situated in another Member State⁴⁰. The use of home State control is the policy envisaged in the White Paper, but it is interesting to note that the proposed Second Banking Directive⁴¹ distinguishes between home control of branches (and of the supply of services) and host State control of the establishment of subsidiaries, although of course the latter are by definition created under local law. In effect it treats setting up a branch as if it were provision of services from another Member State, rather than a form of establishment. It would be foolish to imagine that Community rules easing the exer-

cise of freedom of establishment and freedom to provide services will necessarily be deregulatory in nature. The implementation of the second Directive is dependent upon the simultaneous entry into force of Community legislation on "own funds" and solvency ratios, according to its recitals. A proposal for a Directive on the latter was published in April 1988⁴².

It may finally be noted in the context of the Treaty rules on the provision of services that one specific measure which has not been altered by the Single European Act is art. 61 (2) which states that the liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalisation of the movement of capital. Hence a clear express link is drawn between the Treaty rules on provision of services and those rules relating to the movement of money, a matter noted in the recitals to the proposed Second Banking Directive, and applied in a restrictive way by the European Court in Case 267/86 Van Eycke v ASPA⁴³ where it was held that since the opening of a savings account in another Member State was not yet liberated under the capital movements Directives, it was not a breach of the Treaty provisions on freedom to provide services for Belgium to limit tax exemptions on such accounts to deposits in local currency at credit institutions having their head office (siège social) in Belgium. Presumably such rules will have to be changed when a Community law right to set up savings accounts in other Member States comes into operation.

Competition

It has been clear since the decision in the Züchner case⁴⁴ that in terms of Community competition law, banks are not special, in other words they are not themselves regarded as being entrusted with the operation of services of general economic interest. Hence, in that case it was made clear that if there was a concerted practice with regard to the charges made for the transfer of funds from one Member State to another, then that would be a breach of article 85⁴⁵ (1). It also appears from the German fire insurance cases that even where the market is tightly controlled, as was the case in the German insurance market before the judgment in Case 205/84 Commission v Germany⁴⁶, the competition rules apply at least insofar as there is scope left for competition, repeating a view which had already been taken with regard to certain agricultural sectors, for example. The judgment in these cases also reveals the intriguing thought that even if an agreement appears to relate only to the national market, nevertheless if it affects the branches in that market of companies based in other Member States it may be capable of affecting trade between Member States within the meaning of article 85 (1).

Since the Court's decision in Züchner the Commission has issued a number of formal decisions in the banking sector which give some indication of the types of restriction which it is prepared to tolerate. Hence, it accepted⁴⁷ that the exemption could be given to the Eurocheque system insofar as it led to improvements of the payment system and benefit to users; the uniform conditions being indispensable in the view of the Commission where the system involved a non-reciprocal service by the payee banks, and it was further accepted that the uniform fixing of a maximum gua-

ranted amount, for example, was indispensable for the operation of such system. On the other hand it was made clear that agreements at the national level fixing commissions were not indispensable, and had the effect of eliminating residual competition. In the case of the Irish banks⁴⁸, a negative clearance was given with regard to their agreements concerning opening hours (which at first sight hardly seems beneficial for consumers), clearing rules, and their direct debiting scheme, although the Commission expressly reserved its position with regard to interest rates, as it also did, in rather greater detail, in the Italian banks⁴⁹ case. There, express exemption was also given with regard to agreements on the collection and/or acceptance of Italian bills and documents, on the collection of bank cheques and similar instruments payable in Italy, and on a new uniform type of lira traveller's cheque.

The interesting point, however, with regard to the application of the competition rules in the financial services sector must surely⁵⁰ be the question of agreements relating to interest rates. Before the judgment in Züchner, the Commission had suggested in answer to a written question in the European Parliament that inter-bank agreements on interest rates could be considered⁵¹ as monetary policy instruments of the Member States. However, following the Züchner⁵² judgment, Commissioner Andriessen suggested that interest rates should not be governed by inter-bank agreements even if they were approved, authorised or promoted by the competent national authorities. More recently Commissioner Sutherland is reported as having stated that, "the osmosis which sometimes exists between supervisory authorities and those they supervise blurs⁵³ a distinction between genuine monetary policy and cartels". It may be observed that the decisions relating respectively to Irish and Ita-

lian banks expressly refrain from deciding whether interest rate agreements breach the competition rules or not. One aspect of the matter came before the European Court in Case 267/86 Van Eycke⁵⁴, where the view appears to have been taken that it was in order for national legislation itself to lay down the maximum rates of interest to be paid on deposit accounts in order to benefit from tax exemption, but that it would be a breach of the Treaty rules for the legislation to require or incite deposit-holders to follow the terms of a previous agreement between credit institutions (which in practice had not been universally followed). This gives rise to a very subtle distinction: it is permissible for national legislation itself to lay down rules as to interest rates, but it is not permissible for national legislation to order banks to follow an agreement reached between the banks themselves.

Again, however, the policy question remains: should competition with regard to interest rates be permitted even to the extent that it might affect exchange rates? Or, on the other hand, should exchange rates and interest rates be the fixed parameters within which competition may take place?

Capital and Current Payments

The free movement of capital is the only one of the basic freedoms established by the EEC Treaty which has not been held to be directly effective by the European Court. In its judgment in the leading case of Casati⁵⁵, the Court explained this partly on the relationship between the movement of capital and monetary and economic policy in general. Given that article 67 (1) of the Treaty only requires the free movement of capital insofar as that is necessary

for the achievement of the Common Market, the Court took the view that the assessment of what was necessary was a matter for the Council, and on looking at the relevant Council Directives⁵⁶, it noted that there was no obligation on Member States to liberalise the movement of bank notes. The case arose from a breach of Italian exchange control legislation which involved the re-export of German bank notes from Italy after their holder had failed to achieve his intention of using them to buy a piece of machinery in Italy. Having found that there was no obligation to liberalise the movement of bank notes, the Court then took the view that there was no need for a Member State to use the procedures laid down by article 73 of the Treaty in order to restrict the movement of bank notes.

Turning to article 106 of the Treaty which requires Member States to authorise payments in the currency of the Member State in which the creditor resides in relation to services or goods provided by virtue of the provisions of the Treaty relating to the free movement of goods, or freedom to provide services, the Court took the view that this provision did not require Member States to allow the movement of bank notes if such movement was not necessary and indeed standard practice in relation to the transaction in question. By way of parenthesis, one might perhaps wonder whether the Court's view of standard practice in relation to the habits of small businessmen was in fact wholly accurate. Hence, again, the Court found that the powers of a Member State were not limited at all where there was no obligation to liberalise the movement of bank notes. Furthermore, the Court found that the transaction in question could not be an invisible transaction within the meaning of article 106 (3), where the money was in fact being re-exported from the State in which it was supposed to have been spent. The view

expressed in Casati that there is no requirement to allow cash payments was followed in Case 308/86 Lambert⁵⁷, where the Court upheld Luxembourg (and Belgian) rules requiring payments for exports to be by credit transfer or by cheque, to be converted on the regulated market rather than the free market.

It was, however, firmly established by the Court that article 106 (1) concerning current payments could have direct effect insofar as the transaction to which it related was already liberalised under the Treaty in Cases 262/82 and 26/83 Luisi and Carbone⁵⁸. This case, which involved amongst other things medical expenses and touring expenses, is particularly noticeable for the fact that the Court defined the Treaty provisions on services as including the freedom for the recipient of a service to go to another Member State to receive that service there, an interpretation which, it may be suggested, means that virtually any movement of persons between Member States is capable of falling within the scope of the Treaty. The Court held that the third paragraph of art. 106 on invisible transactions was in fact subordinate to the first paragraph on current payments, and then set about defining the concept of current payments as opposed to capital. It took the view in principle that current payments constitute the consideration within the context of an underlying transaction, whereas movements of capital are essentially concerned with the investment of funds. In particular, the court held that the transfer of bank notes does not constitute a movement of capital where it corresponds to an obligation to pay for goods or services. It was however accepted that article 106 only applies to liberalise current payments made in the currency of the State of the creditor, although notice may be taken of the early decision of the English Court of Ap-

peal in Schorsch Meier⁵⁹ that art. 106 empowered a national court actually to give judgment in that currency, an interpretation which appears to go rather further than that given by the European Court itself. The Court did also accept that Member States were entitled to control the genuineness of current payments and to use flat rate limits as a prima facie test for determining what was a current payment. However, the European Court has more recently applied a restrictive literal approach to article 106 in Case 308/86 Lambert⁶⁰, holding that it is not relevant to the way an exporter receives payment, merely being concerned to ensure that the importer is able to make the payment. It may respectfully be suggested that both aspects are equally important to the achievement of the genuine free movement of goods and services, and that this judgment takes an unduly narrow approach.

Although the Court, therefore, endeavoured to make a clear distinction between movements of capital and current payments, it remains the case that the series of Directives on the free movement of capital enacted under article 67 of the Treaty appear to cover both types of transaction⁶¹, although, intriguingly, they require transfers in respect of capital movements to be made on the same exchange rate conditions as those governing payments relating to current transactions, a terminology which appears to recognise that there are two different concepts. In the version resulting from Directive 86/566⁶², which in effect merged the old lists A and B and added certain other elements to those lists, list A, which is a list of transactions which must be liberalised, includes direct investments, as has already been mentioned, but excludes purely financial investments giving an indirect means of moving into the capital market. The list does however expressly include transfers in per-

formance of insurance contracts "as and when free movement in respect of services" is extended to them. It may be suggested that this adds little to the effect of the first paragraph of article 106 on current payments, and makes the distinction drawn in the insurance cases between the types of insurance service which may be offered by companies established in another Member State and those which may not, without a further authorisation, of even greater importance. Indeed, list A does actually expressly include transfers of monies required for the provision of services, which is a clear overlap with the concept of current payments enounced in Luisi and Carbone.

On the other hand, list C which defines the transactions whose liberalisation is not required, includes the opening and the placing of funds on current or deposit accounts, and the physical import and export of financial assets. The fact that such movements may still be restricted is of course of theoretical interest given the current situation in the United Kingdom, but remains of considerable interest for a number of other Member States. Complete liberalisation from 1 July 1990 is envisaged in Directive 88/361⁶³, but not without strings. Proposals aimed at eliminating or reducing risks of tax evasion and tax avoidance are required to be put forward and considered during the interim period.

However, even where liberalisation is expressly required by Community legislation, derogations from that liberalisation have been permitted and will continue to be possible under the 1988 Directive, albeit by a somewhat more restricted procedure (though it may be doubted whether the terms of a Directive may prevent the exercise of powers which will still exist under the Treaty itself). In this context, it

may be observed that the procedure laid down in the section of the Treaty concerned with capital movements in article 73 to authorise restrictions, has not in practice been used. Rather, restrictions have been authorised under article 108 which is concerned with the balance of payments or, more accurately, the protection of the balance of payments of a Member State. In its judgment in Case 157/85 Brugnoni and Ruffinengo⁶⁴, the Court seemed to accept that article 5 of the Capital Movement Directive⁶⁵ allows controls indispensable to prevent breaches of safeguard measures authorised under article 108. However, it also accepted that a decision taken in 1985 under article 108 could continue safeguards originally enacted in 1974 to protect the balance of payments. One may wonder whether there really could be said to have been a threat to the Italian balance of payments continuing throughout all that time, and it is of some interest to note that following the extension⁶⁶ of the liberalised capital movements by Directive 86/566, additional safeguard measures were enacted in favour of those Member States which were at that stage permitted to restrict otherwise liberalised movements⁶⁷, to allow protective measures under article 108 (3) with regard to operations newly liberalised under the Directive.

To make a further comparison with the free movement of goods, the point may be taken that when the Commission gives a Member State authorisation under article 115 not to grant Community treatment to goods in free circulation in another Member State, having been imported from a third country, the Court has consistently held that since this is a derogation from one of the fundamental freedoms of the Treaty, the Commission must take great care when exercising its powers. In particular, it appears both from the Kaufhof⁶⁸ case and the Ilford case⁶⁹ that the Commission must be

satisfied both that the Member State is authorised as a matter of Community law to have the measure of commercial policy whose protection it is seeking, and that the threatened importations would actually be likely to endanger that policy. Unfortunately, in Brugnoni and Ruffinengo, there appears to be no real discussion as to whether the Commission is under a duty when using article 108 to investigate the seriousness of any threat to the balance of payments of the Member State, and whether the transactions in question would be likely to threaten the balance of payments. The specific provision in article 3 of the 1988 Directive, however, requires the Commission to consult the Monetary Committee and the committee of governors of the Central Banks, and is subject to a power of revocation or amendment in the Council.

Be that as it may, as the Directives do operate without derogation, they will not include what ordinary private citizens would regard as the free movement of money, that is the ability freely to move cash or to open current accounts, until mid 1990. The policy question remains, however, as to whether it is desirable that such a freedom should be established before the European Monetary System⁷⁰ and the European Currency Unit⁷¹ are uniformly applied and recognised, or indeed whether one should wait until a further stage of monetary integration. The published view of the Economic and Social Committee, which brings together both sides of industry, is that liberalisation⁷² cannot be achieved without stabilization of exchange rates .

Whilst it is beyond the scope of this paper to describe in detail the workings of the European Monetary System, the basis of its exchange rate mechanism is that each participating currency has a "central rate" fixed against the Eu-

ropean Currency Unit (ECU), subject to a fluctuation margin of + 2.25% (or + 6% in the case of Italy), and that a "threshold of divergence", which may trigger correction measures, is fixed at 75% of the maximum spread of divergence set for each currency; adjustments of central rates require mutual agreement of the participating Member States. Whilst it is not, therefore, a rigid system of fixed exchange rates, it offers a degree of relative stability in a world of floating exchange rates. An element of responsiveness in the system arises from the fact that the central rate is fixed against the ECU, which is a "basket" currency unit defined in terms of the sum of fixed elements of the national currencies which make up the basket (i.e. 0.0878 pound sterling, 1.13 French francs, 0.719 German marks, etc.). The overall value of the basket depends on the daily value of these currency elements, but these fixed elements do not change automatically when central rates are altered or market values fluctuate, so that the percentage composition of the unit in terms of national currencies may change: the percentage share of a currency which rises in value will increase, and that of a currency whose value diminishes will decrease. The ⁷³1978 Resolution of the European Council expressly provides that any revision of the relative weights of the currencies must not modify the overall external value of the ECU, which was originally required to be the same as that of the previous European Unit of Account (EUA) created in 1975, which in turn was based on the value in June 1974 of the "Special Drawing Rights" of the ⁷⁴International Monetary Fund (SDR). This was also a "basket" unit, but giving a heavy weighting to the United States dollar, which is not included in the ECU basket. The original value of the SDR was based on the gold value of the U.S. dollar ⁷⁵, which also happened to be the value of the old unit of account originally used by the European

Communities⁷⁶. Despite the historical interest of this element of continuity in Community units of account, it may perhaps be suggested that it is the absence of any reference to the dollar in the current ECU which has led to its growing use as a denominator of long-term loans in the financial markets.

Indeed, it must be emphasised that in the modern world the Community can hardly be treated in isolation in matters of monetary policy. Therefore, it may be suggested that one of the more positive provisions in the Single European Act is the amendment to article 70 (1) of the EEC Treaty, which enables the Council to enact legislation concerning the movement of capital to non-Member States by a qualified majority, except insofar as such measures may constitute a step backwards from the existing level of liberalisation, in which case unanimity would be required. One might therefore wonder if we are about to witness the beginning of a common monetary policy of the Community towards the outside world - or would that be too much to hope for? One of the first results of the revised article 70 (1) is article 7 of the 1988 capital movements Directive, under which Member States shall endeavour to attain the same degree of liberalisation in their treatment of transfers in respect of movements of capital to or from third countries as that which applies to operations with residents of Member States. On the other hand, article 7 of the proposed second banking Directive has acquired a certain notoriety for its insistence on reciprocity in the context of the acquisition of participations in credit undertakings and the establishment of European Community subsidiaries by third country undertakings.

Footnotes

- 1) Case 7/78 R. v Thompson [1978] ECR 2247. Insofar as the European Court treated Krugerrands in that case as being the subject of monetary transfer falling outside the free movement of goods, it has been heavily criticised - see F.A. Mann, Legal Aspects of Money (4th ed. 1982), at pp. 24-25.
- 2) Created by the Resolution of the European Council of 5 December 1978 (EC Bulletin 1978, No. 12, Point 1.1.11) and EC Council Regulation 3181/78 (OJ 1978 L379/2).
- 3) Defined by Council Regulation 3180/78 (OJ 1978 L379/1) as amended by Council Regulation 2626/84 (OJ 1984 L247/1).
- 4) Council Directive of 11 May 1960 (JO 1960, p. 921), as amended by Council Directive 63/21 (JO 1963, p. 62) and Council Directive 86/566 (OJ 1986 L332/22).
- 5) See List A of Annex I to the Directives.
- 6) Heading I of the Nomenclature of Capital Movements (Annex II to the Directives).
- 7) See e.g. Case 48/75 Royer [1976] ECR 497, at pp. 509-510.
- 8) For the purposes of this paper, reference will be made to Case 205/84 Commission v Germany (4 December 1986), [1987] 2 CMLR 69.
- 9) Art. 60.
- 10) It raises, for example, the question whether a lawyer setting up an office in another Member State can invoke the provisions of Council Directive 77/249 on the exercise by lawyers of freedom to provide services (OJ 1977 L78/17). See Usher, Establishment, Services and Lawyers, Scots Law Times, 23 February 1979, at pp. 69-70.
- 11) OJ 1988 L172/1.
- 12) 28 January 1986; [1987] 1 CMLR 401.
- 13) OJ 1988 C84/1.
- 14) The question of the extent to which tax considerations may limit freedom of establishment has been directly raised in the reference in R. v Treasury ex p. Daily

Mail[1987] 2 CMLR 1.

- 15) It had been held in Belgium, before U.K. accession, that an English company moving its primary establishment to Belgium became wholly subject to Belgian company law (Belgian Cour de Cassation, 12 November 1965, Pasicrisle Belge 1966 I 336), and it would appear that in French law a company would in principle be regarded as a nullity if its "siège réel" was different from the country of incorporation (see e.g. Renault, *La reconnaissance mutuelle des sociétés dans le Marché Commun*, *Revue pratique des sociétés civiles et commerciales* 1968, p. 207, at p. 211).
- 16) 10 July 1986; [1987] 2 CMLR 247.
- 17) 27 September 1988.
- 18) Compare Case 136/78 Ministère Public v Auer [1979] ECR 437, where the Court held that France could not be required to recognise an Italian veterinary qualification in the absence of any national or Community legislation to that effect, with Case 271/82 Auer v Ministère Public [1983] ECR 2727, where it was held that France was obliged to recognise that qualification following the expiry of the time limit for implementing Council Directive 78/1026 (OJ 1978 L362/1) on the mutual recognition of qualifications in veterinary medicine.
- 19) Case 37/74, [1974] ECR 1229.
- 20) Case 39/75, [1975] ECR 1547.
- 21) Case 120/78 Rewe v Bundesmonopolverwaltung für Branntwein [1979] ECR 649.
- 22) See e.g. Case 65/75 Tasca [1976] ECR 291, at p. 308.
- 23) See Case 205/84 Commission v Germany (4 December 1986) at paras. 39 and 64.
- 24) [1980] ECR 833.
- 25) [1980] ECR 881.
- 26) Cases 110 and 111/78 Ministère Public v Van Waesemael [1979] ECR 35.
- 27) Council Directive 87/102 (OJ 1987 L42/48) art. 1(2)(a).
- 28) 4 December 1986; [1987] 2 CMLR 69.

- 29) Ibid. para. 39.
- 30) Ibid. para. 47.
- 31) Ibid. paras. 37 to 40. See EC Council Directives 73/239 (OJ 1973 L228/3) and 79/267 (OJ 1979 L63/1).
- 32) Ibid. para. 49.
- 33) Directive 88/357, OJ 1988 L172/1.
- 34) OJ 1978 L151/25.
- 35) Case 205/84 Commission v Germany (see note 25), para. 56.
- 36) Ibid. para. 52.
- 37) OJ 1973 L194/1.
- 38) EC Council Directive 85/611 on "undertakings for collective investment in transferable securities (UCITS)" (OJ 1985 L375/3).
- 39) Art. 4(1).
- 40) Arts. 44 and 45.
- 41) OJ 1988 C84/1.
- 42) OJ 1988 C135/4.
- 43) 21 September 1988.
- 44) Case 172/80 Züchner v Bayerische Vereinsbank [1981] ECR 2021.
- 45) Case 45/85 Verband der Sachversicherer (27 January 1987).
- 46) 4 December 1986; [1987] 2 CMLR 69.
- 47) Commission Decision 85/77 (OJ 1985 L35/43).
- 48) Commission Decision 86/507 (OJ 1986 L295/28).
- 49) Commission Decision 87/103 (OJ 1987 L43/51).
- 50) See Dasse and Isaacs, EEC Banking Law (1985), at pp. 37-39.
- 51) WQ 199/79 (OJ 1979 C213/6).

- 52) Speech cited in Dassel and Isaacs, *op.cit.*, p. 38.
- 53) Agence Europe No. 4543, 6 May 1987, at p. 9.
- 54) 21 September 1988.
- 55) Case 203/80, [1981] ECR 2595.
- 56) Council Directive of 11 May 1960 (JO 1960, p. 921), as amended by Council Directive 63/21 (JO 1963, p. 62) and Council Directive 86/566 (OJ 1986 L332/22).
- 57) 14 July 1988.
- 58) [1984] ECR 377.
- 59) [1975] QB 416.
- 60) 14 July 1988.
- 61) Council Directive of 11 May 1960 (JO 1960, p. 921), as amended by Council Directive 63/21 (JO 1963, p. 62) and Council Directive 86/566 (OJ 1986 L332/22).
- 62) OJ 1986 L332/22.
- 63) OJ 1988 L178/7.
- 64) 24 June 1986.
- 65) Council Directive of 11 May 1960 (JO 1960, p. 921), as amended by Council Directive 63/21 (JO 1963, p. 62) and Council Directive 86/566 (OJ 1986 L332/22).
- 66) OJ 1986 L332/22.
- 67) Commission Decisions 87/150 (Ireland), 87/151 (Italy) and 87/152 (Greece) (OJ 1987 L63/34, 36 and 38).
- 68) Case 29/75, [1976] ECR 431.
- 69) Case 1/84R, [1984] ECR 423.
- 70) Created by the Resolution of the European Council of 5 December 1987 (EC Bulletin 1978, No. 12, Point 1.1.11) and EC Council Regulation 3181/78 (OJ 1978 L379/2).
- 71) Defined by Council Regulation 3180/78 (OJ 1978 L379/1) as amended by Council Regulation 2626/84 (OJ 1984 L247/1).
- 72) OJ 1988 C175/1.

73) Art. 2(3).

74) Council Decision of 21 April 1975.

75) International Monetary Fund Articles of Agreement, art. xxi section 2; see Mann, Legal Aspects of Money (4th ed. 1982), pp. 507-8.

76) See Usher, Financing the Community, in: Thirty Years of Community Law (1983), at pp. 195-6.